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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 867

NATHAN HERZOG AND EMANUEL HERZOG, INDIVIDUALLY AND AS CO-PARTNERS, TRADING AS COLUMBIA PICKLE WORKS, BANKRUPTS,

Petitioners,

vs.

JACK DORMAN, TRUSTEE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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vs.

JACK DORMAN, TRUSTEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Nathan Herzog and Emanuel Herzog, individually and as co-partners, trading as Columbia Pickle Works, pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered on the 14th day of October, 1941, reversing by a divided court an order of the District Court of the United States for the Southern District of New York

dated the 27th day of August, 1940, which granted a discharge in bankruptcy to petitioners (R. 129-130). The order of the District Court had reversed an order of the Referee in Bankruptcy denying discharge (R. 118-9).

Petitioners respectfully show as follows:

Jurisdiction.

The order on mandate below was entered on October 14, 1941 (R. 137).

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended; 28 U. S. C. 347 (a).

Opinions Below.

The majority opinion of the Circuit Court of Appeals was written by Judge Swan, Judge Augustus N. Hand concurring (R. 134-136). Judge Clark wrote a dissenting opinion (R. 136-137). The opinions are reported in 121 F. (2d) 581.

The opinion of the District Court is set forth on pages 125-129 of the record. The opinion of the Referee in Bankruptcy appears in the record at pages 116-118.

Statute Involved.

The statute involved is Section 14.c.(2) of the National Bankruptcy Act, U. S. C. A., Title 11, Chap. 3, Sec. 32.c.(2), which is set forth in full in the Appendix attached hereto.

The Question Presented.

Where a bankrupt keeps books honest, though not legally sophisticated, does the Bankruptcy Act require more.

The Facts.

For approximately twenty-five years (fol. 337) prior to the filing of the petition in bankruptcy, the petitioners had been engaged in business in the retail sale of pickles

and condiments as employees of their father who had done business under the name of Columbia Pickle Works (fols. 375, 336-7). Their father died in or about 1929 and thereupon they filed a trade certificate in the office of the Clerk of the County of New York and continued as co-partners in the same business under the same name of Columbia Pickle Works (fol. 375). They were route salesmen, that is to say, that each was a chauffeur of an automobile truck with a specified route and as they visited their customers each day they took orders and made deliveries (fols. 267, 271). They worked from 8 A. M. to 7 or 8 P. M. daily (fol. 268).

In 1931 a corporation was formed known as the Columbia Pickle & Food Products, Inc. (fol. 347). Petitioners were the holders and owners of all the stock of that corporation (fol. 269) and continued as route salesmen and chauffeurs (fol. 267). The general management of the business was conducted by one Abraham Zinn (fol. 329). That corporation was intended to and actually did take over the entire business of the Columbia Pickle Works (fols. 273-4).

The corporation opened a full set of books and those books were regularly audited by a certified public accountant (fols. 24, 268) and thereafter every transaction was entered in the corporation books (fol. 300).

However, the bank account maintained by the co-partners in the Manufacturers Trust Company was continued in the name of Columbia Pickle Works and was never transferred into the name of the corporation. But every deposit made in the said account and every withdrawal therefrom was entered in the corporate books (fol. 258). Except for the fact that the bank account was not in the name of the corporation, the books were distinctly a corporate set of books (fols. 247-8).

Due to the fact that petitioners and their father had been doing business with the same people for so many years and

had always been known as the Columbia Pickle Works, after the formation of the corporation many customers continued to make their checks payable to Columbia Pickle Works although the billheads bore the name of the corporation. Many of the people from whom the corporation purchased merchandise billed Columbia Pickle Works and not the corporation. However, all transactions, both purchases and sales, were recorded in the corporation books of account (fols. 295-297), and those books truly and accurately reflect a complete and detailed history of all the business transactions had either by the Columbia Pickle Works or by Columbia Pickle & Food Products, Inc. The corporation filed its tax reports based upon all the business done as a single proprietor (fol. 300) and the petitioners filed their income tax reports showing only the receipt of salary from the corporation (fol. 301).

No charge is made that petitioners destroyed, concealed or removed any books or records (fol. 221), nor that the books did not truly record all the transactions of both the partnership and the corporation (fol. 351), and the sole question seems to be the propriety of the transactions of both the corporation and the partnership being kept in the same set of books (fol. 238).

The partnership and the corporation simultaneously filed their petitions and schedules in arrangement proceedings and submitted therewith a proposed plan of arrangement (fols. 245-246). In the proposed plan submitted by the petitioners there is contained the following statement:

> "That petitioners believe that they are not personally responsible for the obligations, but, there is some doubt in their minds and therefore have filed this petition in conjunction with the petition of the Columbia Pickle & Food Products, Inc." (fols. 175-6).

The schedules of both partnership and corporation listed the same assets and the same liabilities. Neither partner had any individual creditors (R. 135).

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of bankruptcy law which should be finally settled by this Court.

2. The decision of the majority of the Circuit Court of Appeals in so far as it attempts to establish a standard of bookkeeping is in conflict with decisions of the Circuit Courts of Appeals for the Third, Fifth and Tenth Circuits.

3. The decision of the majority of the Circuit Court of Appeals, in reversing the District Court without finding an abuse of discretion by the District Court, is in conflict with decisions of the Circuit Courts of Appeals for the Sixth, Eighth, Ninth and Tenth Circuits.

4. The decision of the majority of the Circuit Court of Appeals, in so far as it holds "under the statute honesty is not enough," is in conflict with its own ruling that "a discharge is a privilege accorded to bankrupts by the statute unless they are chargeable with conduct showing some lack of personal business morality."

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be named therein, the full and complete transcript of the record and of all proceedings in the cause there entitled "In the Matter of Nathan Herzog and Emanuel Herzog, individually and as co-part-

ners, trading as Columbia Pickle Works, Bankrupts-Appellees; Jack Dorman, Trustee-Appellant"; and that the decree of the Circuit Court of Appeals in said cause be reviewed and reversed by this Honorable Court, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

NATHAN HERZOG,
EMANUEL HERZOG,
Individually and as Co-partners,
Trading as Columbia Pickle Works.